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IN THE HIGH COURT OF JUDICATURE AT BOMBAY.@@
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CIVIL APPELLATE JURISDICTION.@@
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SECOND APPEAL NO. 933 OF 2003.@@
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1. Shri Sudhir Narayan Wadekar
(Since deceased) by his legal
heirs and representatives.

(A) Smt. Mangal Sudhir Wadekar.

(B) Miss Monika Sudhir Wadekar.

(C) Master Vishal Sudhir Wadekar.

(D) Master Mangesh Sudhir Wadekar.

2. Shri Sunil Narayan Wadekar.

Vs.

1. Shri Pratap Ramchandra Wadekar.

2. Shri Hindurao Ramchandra Wadekar.

3. Shri Shaktinath Ramchandra Wadekar
(Since deceased by his legal heirs).

(A) Smt. Kaveri Shaktinath Wadekar.

(B) Miss Pogi Shaktinath Wadekar.

4. Smt. Padma Dinkar Mane.

Shri S.J. Rairkar for the Appellants.
Shri S.N.Chandrachood for Respondent No.1.

‰ ‰ ‰ CORAM : A.S. OKA, J.@@
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‰ ‰ ‰ DATE : 28TH JULY, 2004.@@
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ORAL JUDGMENT@@
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.‰‰ Heard Counsel appearing for the parties. Second Appeal is filed by the original Plaintiffs. The suit filed by the Appellants is for declaration that the Respondents have no right, title or interest in respect of the suit property. A prayer for Decree of perpetual injunction was also incorporated in the Plaint. The case of the Appellants is that Narayan, the father of the Appellants and Ramchandra, who is the father of the Respondents NO.1 to 4 were brothers and in the year 1951 there was a partition between Narayan and Ramchandra. The case of the Appellants is that Ramchandra disposed of by sale land bearing survey Nos. 27/3 on 15th June, 1950 which was the joint property of Narayan and Ramchandra and the Ramchandra appropriated the entire sale proceeds to himself. The case is that in so far as the suit property is concerned,the same was resumed by the State Government and in the year 1973 the said Narayan got the suit property released from State Government by paying the necessary amount. The case of the appellants is that they are in exclusive possession of the suit property. The Respondents disputed the case made out by the Appellants and submitted that the suit property is also a joint property of Narayan and Ramchandra and the Appellants cannot claim exclusive possession over the suit property as Respondents were having 1/2 share in the said property.

2.‰ The trial Court decreed the suit. In an Appeal preferred by the Respondents, the decree passed by the trial Court has been set aside. The Appellate Court held that the Appellants have failed to prove that they are the exclusive owners of the suit property and are in possession of the same. Being aggrieved by the decree of the Appellate Court, the appellants have preferred the present Appeal.

3.‰ The learned Counsel appearing for the Appellants relied upon the judgment of Apex Court in the case reported in (2002) 4 Supreme Court Cases 743 (M.L. Subbaraya Setty (dead) by LRS. and another Vs. M.L. Nagappa setty (Dead) by LRS and others) and submitted that it is an admitted position that the land bearing survey No.27/3 which could have been subject matter of partition between Narayan and Ramchandra was sold by Ramchandra and he has appropriated the sale proceeds of the said land. He submitted that so far as the suit property is concerned, the father of the appellants paid necessary amount to the State Government and got property released in the year 1973 and since then, it is in possession of the Appellants. He submitted that in view of the law laid down by the Apex Court in the aforesaid Judgment, equities will have to be adjusted and the Respondents cannot be allowed to disturb the possession of the Appellants over the suit property as Respondents' predecessor Ramchandra has already appropriated one of the joint properties even before the partition had taken place. He submitted that considering the fact of sale of one property by Ramchandra, the suit property was not made subject matter of the partition which was effected between Narayan and Ramchandra. The learned Advocate appearing for the Respondent No.1 supported the judgment and

decree of the Appellate Court.

4.‰ I have considered the rival submissions. In so far as law laid down by the Apex Court in case of M.L. Subbaraya Shetty (Supra) is concerned it must be noted that Apex Court was dealing with the appeals arising out of a suit for partition. The submissions made by the learned advocate appearing for the appellants on the basis of the said judgment of the Apex Court, prima facie, appear to be correct in the context of the dispute as regards partition of the joint family properties between the parties. In so far as the present Appeal is concerned, it does not arise out of a suit for partition filed between the parties. On plain reading of the averments in the plaint it is not the case of the Appellants that the suit property was not the joint property of Ramchandra and Narayan. The Appellate Court has rightly found that both the Appellants and Respondents have undivided share in the suit property. The said finding appears to be correct on the basis of the pleadings and evidence on record.Once such a finding is found to be correct, the Appellants cannot claim injunction against co-sharers in terms of the prayer made in the plaint. Therefore, no fault can be found with the approach of the appellate Court.

5.‰ It must be made clear that the argument of the learned Advocate appearing for the Appellants based on the law laid down by the Apex court in case of M.L. Subbaraya Setty is not considered by me on merits only because the present Appeal does not arise from a Decree passed in a suit for partition.

6.‰ In so far as Judgment of the Appellate Court is concerned, it appears that the Appellate Court has not recorded any specific finding on actual possession. The Appellate Court has proceeded to allow the appeal as the appellants cannot claim exclusive ownership over the suit property.

7.‰ In view of this position there is no merit in the Second Appeal and Second Appeal is dismissed with no order as to costs. At this stage, the learned Advocate for the Appellants submitted that the Appellants desire to file a suit for partition. He submitted that during the pendancy of the suit in the trial Court the possession of the Appellants over the suit property was protected by an interim order and the Decree for perpetual injunction which was passed by the trial Court was not stayed during the pendancy of the appeal by the District Court. He submitted that as the possession of the appellants over the suit property is protected all throughout, the said protection should be continued for a reasonable period, within which the Appellants will file appropriate suit and will apply for appropriate interim relief in the said suit. The learned Advocate appearing for the Respondents opposed the prayer for grant of protection in favour of the Appellants. However, he stated that he has no objection, if the suit for partition is filed by the Appellants.

8.‰ Considering the peculiar facts and circumstances of the case, this is a fit case where status quo as of today should be ordered to be continued for a period of 12 weeks from today to enable the appellants to file appropriate suit. The suit which may be filed by the Appellants and the application for interim relief made therein shall be decided by the trial Court on its own merits in the light of the observations made in this order. Though the second appeal is dismissed, the parties will maintain status quo as of today in respect of the suit property for a period of 12 weeks. The Second Appeal is dismissed with no order to costs.

.‰‰ Parties to act on an ordinary copy of this order, duly authenticated by the Court Stenographer/Seristedar of this Court.

(A.S. OKA, J.)@@
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IN THE HIGH COURT OF JUDICATURE AT BOMBAY.@@
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CIVIL APPELLATE JURISDICTION.@@
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CIVIL APPLICATION NO. 1433 OF 2003.@@
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IN@@
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SECOND APPEAL NO. 933 OF 2003.@@
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1. Shri Sudhir Narayan Wadekar
(Since deceased) by his legal
heirs and representatives.

(A) Smt. Mangal Sudhir Wadekar.

(B) Miss Monika Sudhir Wadekar.

(C) Master Vishal Sudhir Wadekar.

(D) Master Mangesh Sudhir Wadekar.

2. Shri Sunil Narayan Wadekar.

Vs.

1. Shri Pratap Ramchandra Wadekar.

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3. Shri Shaktinath Ramchandra Wadekar
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(A) Smt. Kaveri Shaktinath Wadekar.

(B) Miss Pogi Shaktinath Wadekar.

4. Smt. Padma Dinkar Mane.

Shri S.J. Rairkar for the appellants.
Shri S.N.Chandrachood for Respondent No.1.

‰ ‰ ‰ CORAM : A.S. OKA, J.@@
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‰ ‰ ‰ DATE : 28TH JULY, 2004.@@
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P.C.

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.%‰ In view of the dismissal of the Second Appeal, Civil Application does not survive and same is rejected.

(A.S. OKA, J.)@@
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